

In the United States Court of Federal Claims

AMENDED GENERAL ORDER NO. 13


The United States Court of Federal Claims is sensitive to rising litigation costs and the delay often inherent in the traditional judicial resolution of complex legal claims. While the mandates of due process inevitably place limits on how **expeditious** a trial of a complex issue **can** be, there are no such limits when parties voluntarily **seek** noncompulsory settlements. Since justice delayed is justice denied, it is an obligation of this court to further the settlement process in all ways consistent with the ultimate guarantee of a fair and complete hearing to those disputes that cannot be resolved by mutual consent. Courts are institutions of last resort and while preserving that "last **resort**" as a sacred trust, they should insure their use only when other methods of dispute resolution have failed. In response to these concerns, the court is implementing three methods of Alternative Dispute Resolution: **Settlement Judges**, **Mini-Trials**, and **Third-Party Neutrals**. The methods to be used in the Court of Federal Claims are described in the "Notice to Counsel" attached to this Order.

IT IS ORDERED, effective this date, that the **Notice** to Counsel shall be distributed as follows:

- (1) to counsel for all parties in cases currently pending before the Court of Federal Claims, and
- (2) to counsel for all parties in cases filed after the date of this Order.

November 8, 1996

BY THE COURT



LOREN A. SMITH
Chief Judge

NOTICE TO COUNSEL

Alternative Dispute Resolution Techniques

In response to rising litigation **costs** and the delay often inherent in the traditional judicial resolution of complex **legal** claims, the **United States Court of Federal Claims** is implementing three methods of alternative dispute resolution (**ADR**) for **use** in appropriate cases. **The Court of Federal Claims** encourages all reasonable avenues toward settlement of disputes, including the usual dialogue between the **trial** judge and counsel. Implementation by the **court of these ADR methods does** not preclude use by the **parties** Of other ADR techniques which do **not** require court involvement.

The **ADR** methods outlined below **are** both **voluntary** and flexible, and **should** be employed early in the litigation process in order to minimize discovery. Both parties must **agree** to use the procedures. **Because** these procedures are **designed** to promote settlement and involve the application of judicial resources, however, the **court** views their use as most appropriate where the parties anticipate a lengthy **discovery period followed** by a protracted trial. These requirements typically will be met where the amount in controversy is greater than **\$100,000** and **trial** is expected to last more than one week.

When both counsel agree and wish to employ one of the ADR methods offered, they **should** notify the presiding judge of their intent **as early as** possible in the proceedings, or concurrently with submission of the Joint **Preliminary Status** Report required by Appendix G. The **presiding** judge will consider counsels' request and make the final decision whether to refer the case to ADR. If ADR is considered appropriate, the presiding judge will refer the case to the ADR Administrator 1) for assignment to a **Court of Federal Claims** judge who will act as a settlement judge or preside over a mini-trial, **or 2)** for **the** appointment of a third-party neutral. If **the** case is referred to an ADR judge, that judge **will** exercise ultimate authority over the form and function of each method within the general guidelines adopted by the court. Accordingly, the parties will promptly meet with the assigned **ADR** judge to establish a schedule and procedures for the technique chosen. Should none of these techniques produce a satisfactory settlement, the case will be returned to the presiding judge's docket. Except as **allowed** by **Federal Rule of Evidence 408**, **all** representations made in the course of the selected ADR **proceeding** are confidential and may not be used for any reason in subsequent litigation.

I. General Provisions

A. Administrator. There will be an ADR Administrator who will assign cases as well as facilitate the program. The Administrator will **also** keep **statistics** for each judge who volunteers to participate in the program on the number of pending ADR **cases** and the disposition of ADR cases.

B. **Training.** All judges, as well as third-party neutrals shall be properly trained in the handling of ADR matters.

C. **Consent.** Consent of all parties is required in order for a case to be referred to ADR.

D. **Judicial Involvement.** The Administrator will assign ADR cases only to judges who have agreed to participate in the program.

II. Settlement Judge

In many circumstances, settlement can be fostered by a frank, in-depth discussion of the strengths and weaknesses of each party's case before a neutral advisor. Although this alternative can be used successfully at any stage of the litigation, it is suggested that it be adopted as early in the process as feasible to eliminate unnecessary cost and delay. Moreover, the agenda for these meetings with the settlement judge should remain flexible to accommodate the requirements of the individual cases. Through this ADR method, the parties will gain the benefit of a judicial assessment of their settlement positions, without jeopardizing their ability to obtain an "impartial" resolution of their case by the presiding judge should settlement not be reached.

III. Mini-Trial

The mini-trial is a highly flexible, expedited procedure where each party presents an abbreviated version of its case to a neutral advisor (a judge other than the presiding judge), who then assists the parties in negotiating a settlement. Because the mini-trial similarly is designed to eliminate unnecessary cost and delay, it should be adopted before extensive discovery commences. This ADR technique, however, should be employed only in those cases which involve factual disputes and are governed by well-established principles of law. Cases which present novel issues of law or where witness credibility is a major factor are handled more effectively by traditional judicial methods.

Although the procedures for each mini-trial should be designed to meet the needs of the individual case, the following guidelines are appropriate in most circumstances:

(a) **Time Frame** - The mini-trial should be governed by strict time limitations. The entire process, including discovery and trial, should conclude within one to three months.

(b) **Participants** - Each party should be represented by an individual with authority to make a final recommendation as to settlement and may be represented by counsel. The participation of senior management/agency officials (principals) with first-hand knowledge of the underlying dispute is highly recommended.

(c) **Discovery** - Any discovery conducted should be expedited, limited in scope where feasible, and scheduled to conclude at least two weeks prior to the mini-trial. Counsel bear a

special responsibility to conduct discovery expeditiously and voluntarily in a mini-trial situation: Any discovery disputes which the parties cannot resolve will be handled by the mini-trial judge. **Discovery taken** for the **purpose** of the mini-trial may be used in further judicial proceedings if settlement is not achieved.

(d) **Pre-Hearing Matters** - At the close of discovery, the parties should meet with the mini-trial judge for a pre-hearing conference. The parties **normally** should provide for exchange of brief written submittals summarizing the parties' **positions and** narrowing the issues in advance of the hearing. The submittal should include a discussion of both entitlement and **damages**. Contemporaneously with the exchange of the written submittals, the **parties** should **finalize** any stipulations needed for the hearing **and**, where applicable, exchange witness lists and exhibits. The parties also should establish **final procedures** for the hearing.

(e) **Hearing** - The hearing **itself** is informal and should generally not exceed one day. The parties may structure their case to include examination of witnesses, the **use** of demonstrative evidence, and oral argument **by counsel**. **Because** the rules of evidence and **procedure** will not apply, witnesses will be **permitted to relate** their testimony in the narrative, objections will not be permitted, and a transcript of the **hearing** will not be made. The role of the **mini-trial** judge similarly is flexible and may provide for active questioning of **witnesses**. Each party should present a closing statement to **facilitate** the **post-hearing** settlement discussions.

(f) **Post-Hearing Settlement Discussions** - At the **conclusion** of the informal hearing, the principals and/or counsel meet to discuss **resolution** Of the dispute. The mini-trial judge may **play** an active role in the discussions, or be available to render an advisory opinion **concerning** the merits of the claim.

IV. **Third-party Neutrals (eighteen-month pilot program)**

After entry of an order referring a case to ADR, the **parties** may quest the ADR Administrator to appoint a third-party **neutral** from a **limited panel** of experienced attorneys trained to handle ADR. The third-party neutral **shall** have no conflict of interest and shall either have experience in alternative dispute resolution or shall have expertise in the subject matter of the lawsuit. The third-party neutral will meet with the parties and attempt to resolve the dispute.

At the **conclusion** of an eighteen-month trial period, this program will be reviewed and modified accordingly.

V. **Comment**

The court welcomes further input from the **bar** and general public on this **Notice to Counsel** and **Amended General Order No. 13**. This **input** will be considered, along with the **initial** practical: experience under the Order in a continuing **effort** to further the effective administration of justice.